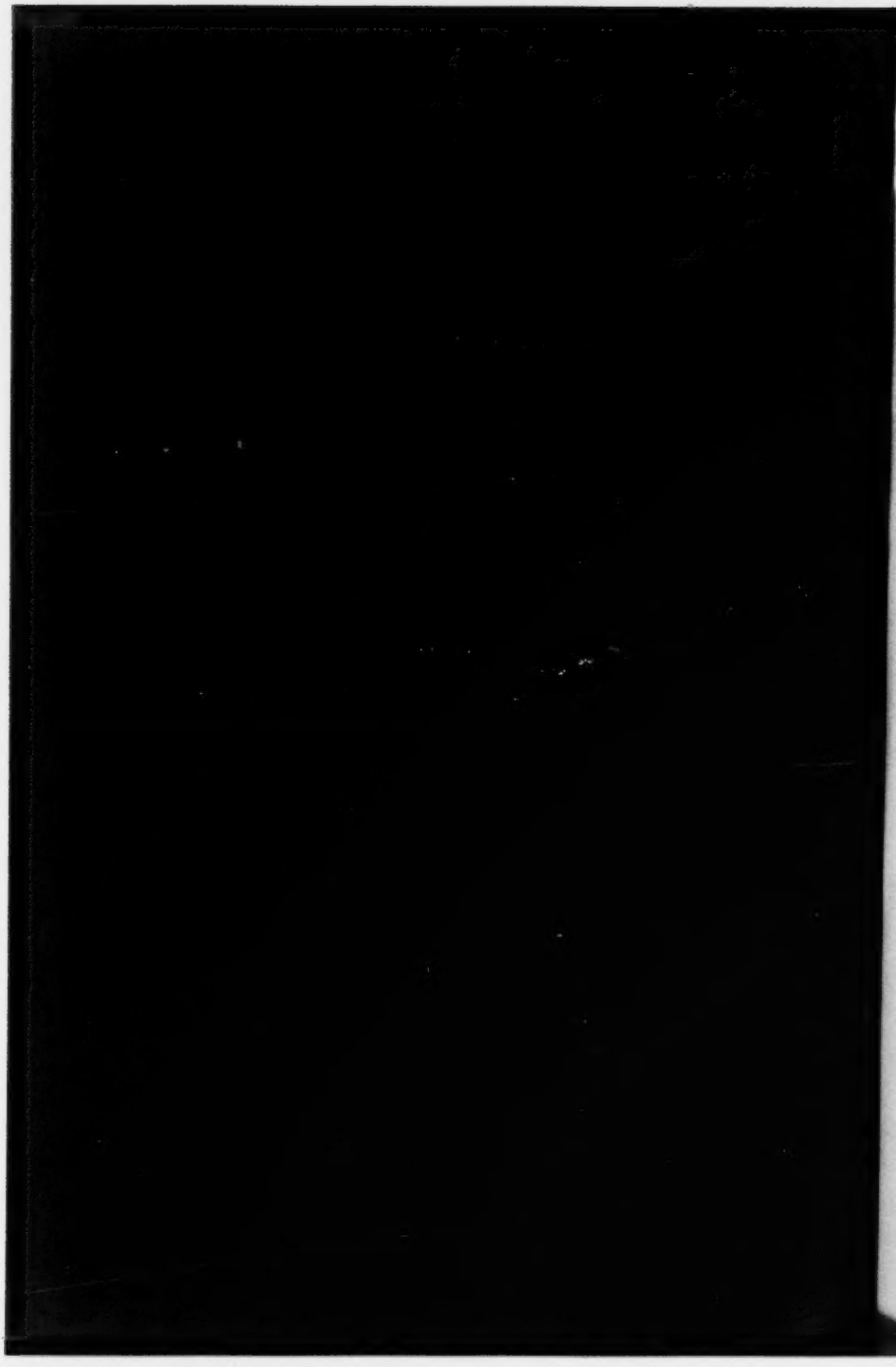

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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 1082

ALVAH H. WEATHERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 236–239) is reported in 126 F. (2d) 118.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 28, 1942 (R. 239–240). The petition for a writ of certiorari was filed March 27, 1942. The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether an indictment for unlawful use of the mails under section 211 of the Criminal Code is fatally defective because a letter upon which it is based does not state positively where or by whom an abortion *will be* produced.

2. Whether the letter which was the basis of the second count of the indictment, on which petitioner had been acquitted at his first trial, was admitted in evidence at the second trial on the first count, and, if so, whether the admission of the letter was error.

3. Whether petitioner was precluded by the trial court from making proper inquiry into the nature of a complaint made against him prior to the sending of a decoy letter and was thereby deprived of an opportunity to show that he was entrapped.

4. Whether the trial court erred in admitting testimony that petitioner had stated that he performed abortions.

5. Whether petitioner was deprived of a fair trial by reason of alleged misconduct of the prosecuting attorney.

6. Whether the trial judge, in the exercise of his discretion, properly directed the jury to deliberate further after they had reported a disagreement, and whether the judge's statement in one of his supplemental instructions that the main question in the case was petitioner's intent had the effect of taking the defense of entrapment from the jury.

STATUTE INVOLVED

Section 211 of the Criminal Code, 18 U. S. C. 334, provides in part:

> Every * * * written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, * * * where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means conception may be prevented or abortion produced, whether sealed or unsealed * * * is hereby declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier. Whoever shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be nonmailable, or shall knowingly take, or cause the same to be taken, from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000, or imprisoned not more than five years, or both. * * *

STATEMENT

Petitioner, a licensed physician (R. 179, 189), was convicted after a second trial under a single count charging violation of section 211 of the Criminal Code in depositing in the mails nonmailable matter which was intended to give infor-

mation where and by whom an abortion would be produced (R. 1–4). The charge was based upon a letter dated December 4, 1939, mailed by petitioner in Jacksonville, Florida, and addressed to "Mary De Veaux" at Savannah, Georgia (R. 3–4).[1] Petitioner was sentenced to imprisonment for one year and a day (R. 11) and his conviction was affirmed by the Circuit Court of Appeals (R. 239–240).

The case for the Government may be summarized as follows:

Petitioner maintained at his house in Jacksonville, Florida, a so-called maternity home where he treated patients and maintained a few beds for their use (R. 100–101, 117–119; 178–179, 181). A housekeeper formerly employed by petitioner testified that he told her that he performed abortions at this establishment for which he charged $50 (R. 102, 107, 109). Petitioner advertised his "maternity home" in newspapers in Savannah, Georgia, and several other southern cities (R. 34,

[1] The indictment originally contained two counts (R. 236), but at the first trial the court directed a verdict of acquittal on the second (Pet. 4), which was based upon another letter. (See R. 237.) Petitioner was convicted on the first count, but on appeal the conviction was reversed by the court below because of improprieties in the argument of the prosecuting attorney (R. 237; see *Weathers* v. *United States*, 117 F. (2d) 585 (C. C. A. 5)). Petitioner has caused the record on his first appeal to be certified and filed with this Court in connection with the instant petition. This volume is identified by the Circuit Court of Appeals docket number 9541.

36–39, 64–66, 84, 86; 177–178, 191) under the names "Vera Smith" and "The Oaks" (R. 36–38; 178, 180–181); many of these newspapers were circulated through the mails (R. 41–42, 65). The advertisements invited correspondence and gave the number of a post-office box in Jacksonville which was rented by a friend of petitioner's (R. 94–97, 178).

Having received a complaint that petitioner was using the mails in advertising an establishment where abortions were performed (R. 81–82, 84, 86), a post-office inspector caused a decoy letter, dated November 29, 1939, to be mailed as a response to one of petitioner's advertisements in the Savannah papers (R. 28–29, 32, 47). This letter purported to be from an unmarried girl who was six weeks pregnant, and requested a solution of her trouble and particulars as to cost and arrangements (R. 32). Petitioner responded, over the signature "The Oaks", by his letter of December 4, 1939, in which he advised the girl to come to his place, that he would take care of her, and that she could "return home in about a week or 10 days" (R. 60). Thereafter, when he received no response to his letter of December 4, petitioner, still using the name "The Oaks", wrote his decoy correspondent several follow-up letters asking why she had not replied and requesting that she advise him when he might expect her (R. 68–70). In one of these letters petitioner assured his correspondent that "there was a way out of this trouble" (R. 69), and

in another he repeated that "everything can be taken care of all o. k." and that she "need have no worry or fear" (R. 68).

Petitioner was arrested on the morning of January 15, 1940 (R. 50, 71, 89–90, 129), and was released on bond later in the day following a preliminary hearing before a United States Commissioner (R. 72, 171–174). A day or two later the post-office inspector received another letter addressed by petitioner to the decoy correspondent which was dated December 17, 1939, but post-marked 6:30 p. m., January 15, 1940 (R. 70–72, 198). This letter was of an exculpatory nature, containing references to "the little one" and advising the correspondent that petitioner could arrange to have the baby adopted (R. 70–71). The letter was the only one of the series written by petitioner which contained any reference to the birth of a baby.

ARGUMENT

1. Petitioner contends (Pet. 10) that the trial court erred in denying his motion to quash the indictment on the ground that his letter of December 4, 1939, set forth *in haec verba* in the indictment (R. 3), did not state positively where or by whom an abortion *would be* produced. The contention is plainly without merit and was rejected by the court below on the previous appeal. *Weathers* v. *United States,* 117 F. (2d) 585 (C. C. A. 5). The statute (*supra,* page 3) interdicts the giving through the mails of information where or by whom an abor-

tion will be produced. The indictment set forth the decoy letter of November 29 which stated a predicament of which an abortion was the solution indicated by the writer, and alleged that petitioner's letter of December 4 was in response to that letter (R. 2–3). It also alleged that in his letter petitioner intended to give and did give information as to "where, how and from whom, and by what means conception might be prevented and an abortion produced" (R. 3, 4). It is apparent that this allegation uses language from the clause of the statute relating to giving information how or by what means conception *may be* prevented or an abortion produced, as well as from the clause relating to information where or by whom an abortion *will be* produced. Though inartistic, the allegation, when read in connection with petitioner's letter advising his correspondent to come immediately, that he would take care of her, and that she could return home in a week or ten days, fairly charges an intent to give and the giving of information as to where and by whom an abortion *would be* produced; the indictment was therefore sufficient.[2]

[2] *Bours* v. *United States*, 229 Fed. 960 (C. C. A. 7), relied upon by petitioner, does not support his contention. The indictment there, unlike that here, did not contain any allegation connecting the defendant's letter with the decoy letter, and the former, standing alone, could not be said to convey information that an abortion *would be* performed (see *id.* at 965).

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2. Petitioner asserts (Pet. 5, 7, 10–11) that the letter which was the basis of the second count of the indictment, as to which the court directed a verdict of not guilty at the first trial, was admitted in evidence; he argues that this was error in that his prior acquittal was an adjudication determining the nonexistence of the facts upon which the second count was based and precluded the use of the letter in the second trial for the offense charged in the first count.[3]

The record negates petitioner's assertion. The letters which were introduced at the trial below were read into the record, but petitioner's letter of December 19, 1939, upon which the second count was based,[4] does not appear among them (see R. 32, 53–54, 60, 66–71). Nor does the record otherwise indicate that the letter of December 19 was offered or admitted.[5]

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[3] Petitioner also implies (Pet. 2, 5) that the trial court admitted other unspecified letters which were not proved to have been written by him. However, on his direct examination, petitioner specifically admitted that he received the decoy letter of November 29 and that he wrote the letter of December 4, which was the basis of the first count (R. 175–176). Thereafter, his counsel handed him other unspecified letters which had been introduced by the Government and asked him whether he admitted "writing some of these." Petitioner replied: "Yes, sir; I wrote those letters." (R. 179.)

[4] This letter appears in the record on the first appeal at page 7.

[5] The record shows an objection by petitioner's counsel to the admission of petitioner's letter of December 4 on the

In any event, even if the letter of December 19 had been admitted, there would have been no error. As the court below pointed out (R. 237), that letter was but one in a series of connected correspondence, and was relevant in the trial on the first count as bearing upon the question of petitioner's intent in mailing the letter charged in that count. The same evidence, if relevant to each charge, is admissible to establish the commission of separate offenses. *Ross* v. *United States,* 103 F. (2d) 600, 605, 607 (C. C. A. 9); cf. *Albrecht* v. *United States,* 273 U. S. 1, 11.[6]

3. Petitioner complains that the trial court refused to permit him through counsel to question the post-office inspector on cross-examination regarding the nature of a complaint which had been made against petitioner. He argues that decoying is justified only if the law enforcement officer has personal knowledge that the suspect has committed the offense under investigation or offenses of the same character, and that the effect of the trial

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ground of *res adjudicata* (R. 58). That letter, however, was the basis of the first count. Counsel later discovered his error and stated that his objection was based upon his mistaken impression that the letter of December 19 was being offered (R. 59).

[6] Petitioner's objection apparently is also directed to other unspecified letters which he says were introduced at the first trial to support the second count. (See Pet. 2, 5, 7.) However, these letters were each a part of the series and were admissible for the same reason as was the letter of December 19.

court's ruling was to deny him an opportunity to show that he was entrapped (Pet. 11–12).

The record shows, however, both that the decoy letter was based upon reasonable grounds to believe that petitioner was using the mails to give information where and by whom abortions would be produced, and that petitioner was not precluded from making proper inquiry into the nature and extent of the information which the inspector previously had in his possession. The inspector testified that he investigated petitioner's practices prior to preparing and mailing the decoy letter (R. 45–46). On cross-examination he stated that he had information that petitioner had used the mails to solicit abortions (R. 81) and that petitioner had been advertising his "maternity home" in newspapers for several years (R. 84, 86). During the course of this cross-examination the inspector stated, with the permission of the court, that he had received a complaint that the mails were being used in advertising an "abortion hospital" operated by petitioner and that upon instructions from his superiors he conducted an investigation which included the preparation and mailing of the decoy letter (R. 86; 81–82).[7] Immediately thereafter peti-

[7] Petitioner argues separately that this testimony was hearsay and prejudicial (Pet. 11). There was no objection to it or motion to strike (see R. 86–87) and its admission was not assigned as error (see R. 16–21) or considered by the court below. The point is therefore not open to petitioner here. *Sonzinsky* v. *United States*, 300 U. S. 506, 514. The

tioner's counsel asked the inspector about "the nature of the complaint" and whether it was a complaint that petitioner "was illegally sending advertising through the mails." Objections to both questions were sustained. (R. 87.) The questions were obviously repetitious of the testimony already given by the inspector and were therefore properly excluded.

Moreover, petitioner's argument misconceives the applicable rules relating to the defense of entrapment. Personal knowledge of offenses against the particular statute for violation of which investigation is being conducted is not prerequisite to use of the decoy method of detecting crime. There is sufficient justification if the officer has reasonable cause to believe that the suspect is engaged in similar criminal conduct and is a person disposed to commit the offense. *Sorrells* v. *United States*, 287 U. S. 435, 451–452; *United States* v. *Becker*, 62 F. (2d) 1007, 1008-1009 (C. C. A. 2). Here the evidence amply established justification and the issue of entrapment was properly submitted to the jury under correct instructions (R. 217–219, 220, 221–222, 226–227, 228–230).

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contention is, in any event, without merit. The testimony was elicited on cross-examination and was, moreover, material on the defense of entrapment. By that defense petitioner opened an inquiry into his conduct and predisposition to violate the statute and brought any disadvantage of the defense upon himself. *Sorrells* v. *United States*, 287 U. S. 435, 451–452.

Sorrells v. *United States, supra; Hunter* v. *United States,* 62 F. (2d) 217, 219–220 (C. C. A. 5); *United States* v. *Becker, supra.*

4. Petitioner argues that it was error to admit the testimony of his former housekeeper that he had told her that he performed abortions (R. 102), and that as a consequence the trial resulted in his conviction for an offense under state law rather than the offense charged (Pet. 12–13). This evidence, however, was relevant to the question of petitioner's intent to give information where or by whom an abortion would be produced, and it was not rendered inadmissible merely because it indicated the commission of offenses against a state. *Moore* v. *United States,* 150 U. S. 57, 61; *Devoe* v. *United States,* 103 F. (2d) 584, 588 (C. C. A. 8), certiorari denied, 308 U. S. 571; *Suhay* v. *United States,* 95 F. (2d) 890, 894 (C. C. A. 10), certiorari denied, 304 U. S. 580.

5. Petitioner contends (Pet. 13–15) that the prosecutor was guilty of prejudicial misconduct. The grounds of his complaint will be considered *seriatim.*

a. On his direct examination petitioner's counsel asked him if he had ever been convicted of a crime and petitioner replied in the affirmative (R. 179). Petitioner complains (Pet. 13) that on cross-examination the prosecutor was permitted, over his objection, to question him as to the number of times he had been convicted of felonies in courts of the United States (R. 186–187). The court

promptly instructed the jury that testimony of former convictions was not evidence as to petitioner's guilt or innocence of the charge on trial but was admitted only for its bearing on petitioner's credibility as a witness (R. 185–186). This was entirely proper. When petitioner took the stand his credibility, like that of any other witness, was subject to impeachment. *Raffel* v. *United States,* 271 U. S. 494, 497. And evidence of prior conviction was, of course, admissible on the question of petitioner's credibility. *Rinella* v. *United States,* 60 F. (2d) 216, 218 (C. C. A. 7); *Jebbia* v. *United States,* 37 F. (2d) 343, 344 (C. C. A. 4), certiorari denied, 281 U. S. 747; *Nutter* v. *United States,* 289 Fed. 484, 485 (C. C. A. 4); *MacKnight* v. *United States,* 263 Fed. 832, 840 (C. C. A. 1).

b. Petitioner also complains (Pet. 13–14) that the prosecutor was permitted to interrogate him as to whether he had been barred from practicing medicine. This sequence brought out that petitioner had been barred by the State Medical Board but that the Florida Supreme Court had ordered his license reinstated. Further charges against petitioner were pending before the Board at the time of the trial. (R. 188–190.) The trial court permitted this inquiry as bearing on petitioner's credibility (R. 189). This ruling also was proper. *People* v. *Dorthy,* 156 N. Y. 237, 241.[8]

[8] Petitioner asserts (Pet. 13) that the prosecutor was permitted to question him as to whether his former wife had

CONCLUSION

The decision below is clearly correct and the petition for a writ of certiorari presents no question calling for review by this Court. It is therefore respectfully submitted that the petition should be denied.

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